[2015] UKFTT 0662 (TC)

TC04781

Appeal number: TC/2014/02569
TC/2014/02571
TC/2014/02574

VAT – whether affiliation fees paid to golf unions standard rated or exempt –ECJ's decision in Canterbury Hockey (Case C-253/07) applied – fees exempt – liability for fees was that of the clubs – recharge to members not disbursement under law (no determination made on whether could be treated as disbursement under ESC) - whether unfair distortion of competition – no- applying CJEU's decision in Bridport and West Dorset Golf Club (Case C-495/12) distortion inherent in exemption - whether reference should be made to CJEU on legality of Value Added Tax (Sport, Sports Competitions and Physical Education) Order 1999 in view of distortion of competition between members golf clubs and proprietary golf clubs – no - issue hypothetical on facts of current appeals

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) ABBOTSLEY LIMITED **Appellants**
(2) CROMWELL GOLF CLUB
(3) V I SAUNDERS and J WISSON
t/a CAMBRIDGE MERIDIAN GOLF CLUB

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at the Royal Courts of Justice, London on 23, 24 and 25 March 2015
Timothy Brown, counsel, for the Appellants
Raymond Hill, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. These appeals concern various issues relating to the VAT treatment of affiliation fees paid by proprietary golf clubs to England Golf and local golf unions contained in HMRC's decision letter to the appellants of 27 February 2014. In particular:

(1) whether such fees represent standard rated supplies as the appellants argue, or whether they are exempt under Item 3 group 10 Schedule 9 VATA 1994 as HMRC argue; and

(2) whether when such fees are recharged by the appellants to their members they can be regarded as disbursements.

2. The appellants also argue (3)(a) that if the supplies are standard rated, or that if they are not disbursements when recharged if exempt, that this gives rise to a distortion of competition between proprietary golf clubs and members' golf clubs, (b) that the Value Added Tax (Sport, Sports Competitions and Physical Education) Order 1999 ("the 1999 Sports Order") has produced or exacerbated the distortion of competition between such clubs and that it does not correctly implement the provisions of the Principal VAT Directive 2006/112/EC and (c) that the issue of the legality of the 1999 Sports Order should be referred to the Court of Justice of the European Union ("CJEU").

3. The first Appellant (Abbotsley Ltd) is a company, which is registered for VAT and which owns a golf club near St Neots in Cambridgeshire. The third appellants are a partnership who operate a golf club in Cambridge. The first and third appellants are both proprietary golf clubs (owned and operated for the benefit of the proprietors). The second Appellant (Cromwell Golf Club) is a members' golf club (a club which is owned and operated for the benefit of its members) and which plays on the first appellant's course.

4. The hearing of the above appeals also originally included an appeal by the Association of Golf Course Owners (1993) ("AGCO") which is a company limited by guarantee and is an association of volunteers representing the interests of proprietary golf clubs in the UK. It was formed in 1993 to fight the distortion in tax in the golf industry. At the beginning of the hearing, there being no objections from the parties or AGCO, I directed under Rule 9 of the Tribunal's Rules that AGCO although it was not a party, as it had no financial interest in the proceedings, could adduce evidence and make submissions.

5. The fact that an association such as AGCO wishes to be involved in these appeals belies the underlying context which has generated the questions which the parties seek to put before the Tribunal. While it may on the face of it seem surprising that the appellants seeks to advance a position whereby the supplies they receive of affiliation fees are standard rated but also that even if they are exempt that they cannot

be treated as disbursements, the appellants were entirely frank in disclosing that the purpose of the rulings they seek on these issues was to demonstrate and underscore their concern that there is an unfair distortion of competition between proprietary clubs and members' clubs arising from the different way they are treated for VAT purposes. In particular, in common with a number of other proprietary clubs who have appeals before the Tribunal, such appellants are keen to have arguments relating to distortion of competition and the 1999 Sports Order, which the appellants argue has had a disastrous effect on their businesses, litigated before the CJEU.

Evidence

6. I heard oral evidence which was cross-examined by HMRC and a witness statement with various exhibits from Vivien Saunders OBE, the sole director and shareholder of the first Appellant and a partner in the third appellant. She is also the Chairman of AGCO. Miss Saunders has been playing golf since the age of seven; she was a professional golfer from 1969 until 2000, has represented Surrey, England, Great Britain and Ireland and has won British and English championships.

7. I also heard evidence which was cross examined by HMRC and received witness statements from the following witnesses who were current or former owners of proprietary golf clubs:

(1) Andrew Smith - Whitehill Golf Club in Hertfordshire

(2) Peter Roberts - Hart Common Golf Club, Bolton

(3) Maureen Marston - Birch Grove Golf Club, Colchester

(4) Malcolm Salt - Horsley Lodge Golf Club, Derbyshire

(5) Peter Millar – Peterstone Lakes Golf Course and Club, Newport, Gwent

8. I found all the witnesses to be credible witnesses of fact. In addition I received and read witness statements from: Jennifer Brown, Max Faulkner, James Gillan, Carol Hobday, Roger Jones, Scynthia Larsen, George Lowe, Edward McCausland, Graham Pain, Kathryn Pick, Stephen Rumball, Richard Salt, Claudio Sarno, Neil Sjoberg, Andrew Sutcliffe, Philip Taylor, Jennifer Wilson, Ronald Wyatt, and Andrew Wyatt.

9. With the exception of certain matters covered in the statements which related to the business affairs of other members' golf clubs these were accepted by HMRC. Each witness statement was from a person involved with a proprietary golf club (apart from Mr Sarno who had had a proprietary sports club). The witness evidence covered the same broad themes and rather than setting out the facts in relation to each I have set out those which are relevant to the appellants in this case and summarised the findings made from the various witness statements and the oral evidence. Some of the matters which were included in the evidence amounted to matters of submission and I have accordingly considered them to the extent they were encapsulated by the appellants' submissions before the Tribunal.

Facts

The appellants

10. As indicated above a distinction is drawn between members' clubs and proprietary clubs.

11. Abbotsley Limited is a proprietary club of which Miss Saunders is the sole director and shareholder and is registered for VAT. It comprises the Abbotsley golf course, Cromwell golf course, a 42 bedroom hotel, a driving range and a par 3 golf course. The freehold of the land is owned by Abbotsley Limited.

12. The Cromwell Golf Club is the club of the members of Abbotsley Limited who pay membership subscriptions to play on the Cromwell course. It is non profit making and is not registered for VAT.

13. Cambridge Meridian Golf Club, in Toft, Cambridgeshire is a partnership run by Miss Saunders and Jenny Wisson, and is a proprietary golf club. It is registered for VAT and owns the freehold of the land.

Affiliation fees and various governing bodies

14. Abbotsley Limited and Cambridge Meridian Golf Club pay affiliation fees to a number of national and regional governing bodies of the game of golf. These are the English Golf Union ("EGU"), the English Ladies' Golf Association ("ELGA"), the Ladies' Golf Union ("LGU"), the Cambridge Area Golf Union ("CAGU") and the Cambs and Hunts Ladies' County Golf Association ("CHLCGA").

15. It is helpful to understand how these bodies fit within the overall structure of golf unions or associations which operate at respectively the UK level, the national level, the county level, and the club level. Put briefly, members affiliate to a club (e.g. the first and third appellant clubs), the clubs affiliate to a county union (e.g. CAGU), the county unions affiliate to the national union (e.g. England Golf), and the national unions comprise the Council of National Golf Unions (CONGU). This structure is also apparent in relation to the unions for women's golf with respectively county associations such as CHLCGA at the county level, ELGA at the national level and LGU at the supra-national level.

16. The above bodies do not determine the rule of golf; those are set by the Royal and Ancient Society Golf Club of St. Andrews.

17. The objects of the various bodies and details of what their constitutions provide in relation to the payment of affiliation fees and the consequences if they are not paid are set out in the following section.

Objects of bodies, provisions on fees and sanctions for non-payment

England Golf

18. England Golf's objects as set out in clause 2 of its constitution include variously:

(1) To maintain a uniform system of handicapping

(2) To arrange Championships, International and other Matches

(3) To co-operate with the Royal and Ancient Golf Club of St. Andrews

(4) To co-operate with CONGU, the European Golf Association and other National Golf Unions and Associations in such manner as may be decided.

19. The membership includes Member Counties (which include the County Golf Unions in England, Member Clubs (these are all clubs in membership with a Member County and Playing Members (all males belonging to the club are playing members of a member club irrespective of membership category.)

20. The EGU amalgamated with ELGA (by that time the English Women's Golf Association) to become England Golf (EG).

21. In relation to payment of fees and the consequences of not paying them Clause 2 of the Rules of EG provide:

> "2.1 Each affiliated club shall pay such annual affiliation fees to [EG] as decided by [EG]. Such annual affiliation fees shall be payable once per calendar year and shall be calculated on a per capita basis for every playing member irrespective of membership category as at 30th June in the preceding calendar year. Such annual affiliation fees will normally be invoiced to playing members as a disbursement. Failure by a Playing Member to pay such annual disbursement shall not exonerate his or her Affiliated Club from its obligation to pay the annual affiliation fee for that Playing Member.
>
> …2.4 Annual affiliation fees become due on January 1st each year…
>
> 2.5 If an annual fee remains unpaid on the 30th June following the date upon which it became due then the membership of the Affiliated Club or Associate Member concerned shall immediately and for all purposes cease with consequential loss of Standard Scratch rating and CONGU handicaps for its Playing Members. Such Member may be reinstated by the Board on payment of all arrears."

Cambridge Area Golf Union (CAGU)

22. The object of CAGU is:

> "…to encourage the playing of amateur golf by promoting matches at County level, inter-club level and on individual basis, and by the staging of championships, competitions and by the giving of prizes and by any other means which from time to time may be determined."

23. Membership is open to all Golf Clubs in the county of Cambridgeshire and its immediate surrounds.

24. CAGU's webpage reflects the above objective and also mentions the championships and competitions are for both scratch and handicap players of all ages. CAGU's activities relate to the playing of men's amateur golf. A number of competitions are listed. It is accepted that in order to enter a number of these a player would need a CONGU handicap (which is discussed in more detail at [39] onwards below).

25. In relation to sanctions for non-payment the rules provide:

> "7. annual subscription
>
> a) Each affiliate Member Club shall pay such annual affiliation fees to England Golf as decided by England Golf. Such annual affiliation fees shall be payable once per calendar year through the County Union and shall be calculated on a per capita basis for every playing member irrespective of membership category as at 30th June in the preceding calendar year in such circumstances if a playing member is a member of more than one affiliated Member Club the annual affiliation fee to England Golf will only be payable once and collected by the "Home Club" for handicapping purposes.
>
> b) In addition each affiliated Member Club shall at the same time pay any such affiliation fee to CAGU as is decided by the Council for every playing male member of such affiliated Member Club as at 30th June in the preceding calendar year starting on 1st January. Such annual affiliation fees will normally be invoiced to playing members as a disbursement. Failure by a playing member to pay such annual disbursement shall not exonerate his affiliated Club from its obligation to pay the annual affiliation fee for that playing member."

ELGA and CHLCGA

26. The 2005 rules and regulations for ELGA provide that each affiliated club shall collect and pay ELGA annual subscriptions for every member entitled to play golf and in additional amounts payable in respect of such members to the LGU. Collection of such payment is stated to be the responsibility of each affiliated Club and not of the individual members. If a club fails to collect and pay the subscription it will no longer be affiliated, its members will cease to be ELGA members and will not be entitled to hold a CONGU handicap.

27. CHLCA similarly states that it is the responsibility of the club to pay the fee and not the individual golfer.

Clubs' experience of collecting fees from members in practice

28. As set out by Miss Saunders' evidence in detail below Abbotsley Limited had faced difficulties in collecting fees from individual members having had to pay the affiliation fees in advance to the various bodies. While only the detail in relation into Abbotsley Limited is set out below the difficulties were echoed in the evidence from other clubs.

29. In 2014 Miss Saunders sent out separate fee notes to all the Abbotsley golfers reminding them of obligation to pay the affiliation fee regardless of whether they were renewing their subscriptions and regardless of whether they wanted a handicap. She reminded them the fee was payable based on headcount of June 30th the previous year. There was no suggestion to them that it was optional.

30. In relation to the Abbotsley Ladies, the company paid for 45 and recovered fees from 35. In relation to the ten who did not pay two were staff of which one had left, four were honorary life members with playing rights and handicaps, two had left by 1 April 2014. Two refused to pay one saying she no longer played in competitions and the other (as explained by Miss Saunders' statement - although it is not at all clear what the member's nationality had to do with her reason for non-payment) "being German".

31. In relation to Abbotsley men, the company recovered fees for 101 men. They were 66 from whom they did not recover fees made up as follows: two honorary life members with playing rights and handicaps, one staff member, three complimentary members, 32 who refused to pay (21 of them having no handicaps). Another 28 did not rejoin by 1 April, one who was on the June 30 headcount had died in the following November.

32. Cromwell Ladies: Out of the 35 players, 27 fees were recovered. Of the eight for whom recovery was not possible, two stayed as members but refused to pay, three were junior girls (Miss Saunders felt it unreasonable to charge them), three did not pay.

33. Cromwell Men: the Men's captain wrote to each member explaining the affiliation fee was mandatory whether or not the members were rejoining. 96 men paid the fees 17 of whom had no handicaps. The club paid for 84. Of that number 45 stayed but refused to pay (30 having handicaps). Five made specific written refusals to pay (of which two had handicaps). Out of the 84 members, 34 did not pay leaving the clubs on 1 April.

34. Miss Saunders indicated she had received different views from governing bodies as to who exactly was liable for the fees, in particular whether the "club" in this context meant the club of members of the proprietary club. She was told by the secretary of CAGU that it was for the treasurer of the men's section to collect on behalf of the club and that it was the member's club that affiliates to CAGU and thereby to the EGU. Later, David Joy the Chief Executive of EG clarified that it was the business i.e. Abbotsley Ltd who was liable.

35. When Miss Saunders had bought Abbotsley in 1987, although she explained she collected her subscription fees in April, CAGU insisted on receiving them in February. This, she says, means they constantly pay for members without knowing whether they would collect the fees. Cambridge Meridian opened on 1 April 1994 and similarly in her view are forced to collect in advance.

36. At Abbotsley in 2013 Miss Saunders sent CAGU a part payment for fees collected by February 2013. The treasurer refused to accept part payment and returned the cheque.

37. In terms of the way in which fees are collected and invoiced for it appears that some clubs charge it as part of the membership subscription with an addition of VAT to whole amount e.g. Mr Salt told us this was the case Horsley Lodge Golf Club in Derbyshire. Others however show the affiliation fee as a separate VAT exempt amount on the invoice.

Benefits provided

38. The services said to be provided by EG included i) Organisation of national championships; ii) Coaching young talent; iii) Investing in golf courses; iv) Support services to golf courses; v) Management of the CONGU handicap system in England; vi) Contributing to golfing magazines vii) Running the England Golf website; viii) Answering questions from golfers and golf clubs; ix) Speaking for the game of golf in England; x) Administering the EWGA Trust; a charity; xi) Managing the National Golf Academy in Lincolnshire. Following the submissions made at the hearing I did not understand there to be any significant dispute between the parties that the predominant services from the bundle offered, and the one which fell to be examined for the purposes of the current appeal was the right of the individual to have a CONGU handicap and therefore to play in serious competitions.

Handicapping, standard scratch scores, and the CONGU handicap

39. Handicapping is a system which is aimed at allowing players of different abilities to play competitively with each other.

40. A standard scratch score is based on length and difficulty of the course and allows golfers to put in scores to be assessed for a handicap.

41. As described by CAGU a trained team surveys each course to establishing a Standard Scratch Score (SSS). This sets out that:

> "while the course length is the main factor in determining the SSS the new system of course rating takes into account many of each course's individual characteristics e.g. number, depth and position of bunkers, length and thickness of rough, density of trees, proximity of water hazards and out of bounds, speed and slope of the greens etc."

42. The literature goes on to explain:

> "Course rating is designed to ensure that the players at each club have a handicap that is comparable and competitive with the members of other clubs in England. Golf's handicapping system is unique in that it is the only sport where players of different age, gender and ability can play competitively with and against one another. It is vital that the integrity of the handicapping system is maintained to ensure that all players can, if they wish, be competitive with any others…"

43. CAGU's role in handicapping is explained thus:

> "CAGU is England Golf's local agent in supporting the county's clubs that operate the CONGU handicapping system which is so vital in ensuring that players can compete with each other on all courses throughout England whatever their ability. Maintaining the integrity of the system is therefore very important and CAGU is available to advise and arbitrate so that the system is fairly implemented and operated."

44. The Rules of Golf are set out by the Royal and Ancient Golf Club of St. Andrews which is as indicated above is the governing authority for the Rules of Golf and Rules of Amateur Status. Rule 6-2(a) requires that in matchplay competition players should determine from one another their respective handicaps and Rule 6-2(b) states that a golfer will be disqualified if no handicap is recorded on his scorecard or the recorded handicap is higher than the one to which he is entitled. The rules do not define the term handicap. It appears from correspondence which took place between Longhirst Hall Golf Course which was exhibited to the witness statement of Thomas Dawson and upon which Miss Saunders was cross-examined that while a player who does not possess a handicap of any sort will not be able to take part in handicap competition, it will be up to the individual or committee organising the conditions of the competition what the entry requirements are. There are many other systems of handicapping; a group of people could introduce their own system of handicapping which they could apply to their own competitions. While it is common practice for conditions to stipulate that an entrant must possess a CONGU handicap it will be up to those running the competition as to whether they make such a stipulation. Miss Saunders' unchallenged evidence was that in England CONGU is only available in to the 700,000 or so golfers who belong to golf clubs. The other two million or so golfers in England who do not belong to clubs either have no golf handicap or simply use some other system within their own groups.

45. Miss Saunders' evidence covered how the CONGU handicapping system worked from a player's perspective in practice. The person seeking the handicap had to play three singles rounds and put in three cards which were then marked by someone else. The person who filled in the card did not have to be a CONGU handicapped person themselves. The club has to operate the system and have appropriate members' committee to run it. The scores then had to be inputted into a computer which was licensed to run the software which allowed the handicap to be generated.

46. Professional golfers do not need a handicap (this was the case for Miss Saunders and also tallied with the evidence of Mr Andrew Sutcliffe in relation to him and his

wife who were both professional golfers). Various competitions organised by CAGU would require the participants to have a CONGU handicap.

47. Many of the golfers staying at the hotel at Abbotsley were not members of golf clubs and enjoyed their golf with society handicaps or some form of informal handicap system which they adopted for their stay at Abbotsley.

48. Miss Saunders accepts the affiliation fees allow her club's golfers to have CONGU handicaps. In cross-examination Miss Saunders estimated that around 30% of the women at the club had represented the club in something at county level and for men this figure was around 5%. She explained that it would be "commercial suicide" if a club did not affiliate as some golfers did want a handicap. She recounted the particular difficulties that had arisen when the club had been temporarily expelled because of a dispute over payment of fees and said it had taken 13 years to recover from that.

49. Mr Smith of Whitehill Golf club estimated that around a third of the golfers at his club did not want a handicap and did not want to play in any kind of competition. Both his evidence and that of Peter Roberts suggested members would leave if the club indicated to them that if the members wanted a CONGU handicap that they should find another club.

50. Handicaps, or certainly the payments perceived to be in made in return for them were by no means universally welcome; Mrs Marston's evidence explained that she received comments from golfers saying they did not see why they should pay if they did not have handicaps or if they did not play in competitions.

51. Mr Salt told the tribunal that the CONGU system did not cater for golfers who played competitively in a pair's format as many of the golfers at his club did.

Benefits to proprietors?

52. Miss Saunders' evidence was that there was no benefit to the proprietor of the club in paying the affiliation fee to England Golf and the county associations; on the contrary it is clear from her evidence that she regards their activities as being detrimental to the interests of proprietary clubs such as hers. The participation in the county card scheme (described in more detail in the section below) meant having to offer discounted green fees to golfers from other clubs participating in the scheme. In relation to England Golf's own club at Woodhall Spa, Miss Saunders mentioned how EG aggressively marketed their own club and that she regarded this as EG effectively competing against her business.

53. This sentiment was echoed but in not quite such stark terms in the evidence of the other proprietors who maintain that EG effectively trades and markets against their interests. In relation to support to golf courses and in particular whether proprietors benefit from marketing advice none of the evidence suggested this had been received and in fact Mr Smith's evidence was to the effect that he would not be

receptive to taking such advice from EG given his views on their financial track record.

County Card Discount Scheme

54. A national county card discount scheme exists which allows members of affiliated clubs who have not opted out of the scheme to play at 1200 other courses across England at up to 50% off the club's standard green fees. Miss Saunders' evidence was that many of the member at her club enjoyed using the discount card. From the club's point of view it also meant having to give discounted green fees to cardholders from other clubs. As explained in CAGU's rules members of affiliated clubs that have not joined the scheme will have a £3.00 deduction made on their affiliation fee. If the club had not opted out then membership was free for male members. Women members could join en bloc if they had contributed an annual cost of £3 per woman member. Alternatively individual women members could buy the card at a cost of £15.

Summary – affiliation fees and CONGU handicaps

55. Taking account of the above the facts relevant to this appeal may be summarised as follows. Clubs do not have to join the county unions and via them EG but they do so to attract members. The main benefits received by members are access to the CONGU handicapping system, being able to play in competitions and the discount card.

56. Fees are calculated on the previous year's headcount. They are the liability of the proprietary club. If they are not paid then there are sanctions (inability to use the handicap and to participate in competitions). Proprietors do not regard the payment of fees as giving rise to benefits to themselves indeed it seems a number of them think the opposite. This was clear from the evidence of Miss Saunders, Mrs Marston and Mr Salt. The clubs are frequently faced with a shortfall when they come to recoup the fee from their members (this was the experience of Miss Saunders and the issue was also apparent from the evidence of Mr Smith and Mr Millar).

57. Handicaps are not essential to play golf on the course, but some players do want them and do want to play in competitions. (This was apparent from the evidence of Miss Saunders and the point was echoed in the evidence of Mr Smith, Mr Roberts.) Members are attracted to clubs where better players play and those players typically want to have a CONGU handicap and want to participate in competitions. Not all golf is played at affiliated clubs.

1999 Sports Order and Licensing Arrangements put in place to allow members to enjoy VAT exempt subscriptions

58. The EGU required all proprietors of golf courses built after the 1980s to arrange for their golfers to form their own member's club which had to have a democratic committee, officers, their own AGM and representation to the county union and the EGU.

59. Miss Saunders' evidence was that before the 1999 Sports Order came into force in 2000 Abbotsley members had had their own club, Abbotsley Country Club with a license from Abbotsley Golf and Squash Club Ltd under which the members were able to enjoy VAT exempt subscriptions. She refers to evidence from Mr Sutcliffe, Mr Andrew and Ron Wyatt, Mr Gillan, Mr Pain and Mr Millar who all had similar sorts of licensing agreements under which the company charged the member's club a license and which in essence allowed the golfers to enjoy VAT exempt subscriptions. HMCE and later HMRC had however challenged the arrangements.

60. In relation to the arrangements at Abbotsley, Miss Saunders explained these were the subject of a tribunal case which found in the appellant's favour (LON/96/148) VAT decision No 15402). Mr Millar and Mr Wyatt's evidence was to the effect they could not afford to defend their position that the licensing arrangements were a legitimate way of enabling golfers to pay VAT exempt subscriptions. Mr Gillan's evidence was that he and his wife challenged HMRC's ruling on the arrangements before the tribunal (case reference MAN/08/0094) but were unsuccessful in their appeal.

61. None of the appellants or the witnesses continued to have such licensing arrangements in place.

Issues:

1. Whether affiliation fees standard rated or exempt?

Law

62. Under what was Article 13A(1)(m) of the Sixth VAT Directive (Council Directive 77/388/EEC and is now Article 132(1)(m) of the Principal VAT Directive (Council Directive 2006/112/EC) ("PVD"), Member States are required to exempt:

> "certain services closely linked to sport or physical education supplied by non-profit making organisations to persons taking part in sport or physical education."

63. Article 13A(2)(b) of the Sixth Directive which is now Article 134 of the PVD provides that the supply of good or services as provided for in a number of points of Article 13A(1) and Article 132(1) including point (m) above shall not be granted in the following cases:

> "(a) where the supply is not essential to the transactions exempted;
>
> (b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT."

64. Those provisons were implemented in the UK by means of Schedule 9, Group 10, Item 3 VATA. That provision exempts:

> "The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part".

65. The provision was considered in the CJEU case of *Canterbury Hockey* (Case C-253/07) which it has been necessary to set out in some detail below given the detail of the parties' submissions on the relevance or otherwise of the case.

Canterbury Hockey Club and Canterbury Ladies Hockey Club v Commissioners for HMRC (Case C-253/07)

66. The case arose from a referral to the ECJ from the High Court in relation to a dispute between two hockey clubs and HMCE. The issue concerned whether the affiliation fees paid by the clubs to England Hockey fell within the exemption above.

67. The hockey clubs were members only sports clubs who were unincorporated associations and who fielded a number of hockey teams. The clubs were members of England Hockey, a non profit-making organisation for the encouragement and development of hockey playing in England. The clubs paid affiliation fees upon which England Hockey charged VAT. The services England Hockey supplied in return were described at [8] of the ECJ's decision as including:

> "a club accreditation scheme, courses for coaches, umpires, teachers and young persons, a network of hockey development offices, facilities for accessing government and lottery funding, advice on marketing and obtaining sponsorship, club management services and insurance and competitions for teams."

68. The appellant clubs in a cross appeal to the High Court argued the UK legislation's reference to "individual" did not properly implement the relevant provisions of the Directive. The reference from the High Court (in so far as is relevant to this appeal) asked whether "persons" in the context of "persons" playing sport was limited to natural persons or whether it could include for example corporate persons.

69. The ECJ noted at [22] that the supplies could only be exempted if they were "essential to the transaction exempted, namely sport or physical recreation" and went on at [23] to say:

> "Thus the exemption of a transaction is to be determined, particularly, on the basis of the nature of the service supplied and its relationship with sport or physical education."

70. In rejecting the view suggested by the UK and Greece that only natural persons were capable of participating in sport it developed the European Commission's argument that in order to take account of the effective application of the exemption, regard had to be had not just to the formal legal recipient of the supply but to its material recipient or effective beneficiary.

71. At [27] the court noted the exemption covered sport in general:

> "which also includes sports necessarily practised by individuals in groups of persons or practised within organisational and administrative structures put in place by unincorporated associations or corporate persons, such as sports clubs…"

72. At [28] and [29] it went on to explain:

> "Sport within such a structure generally entails that, for practical, organisational or administrative reasons, the individual does not himself organise the services which are essential to participation in the sport, but that the sports club to which he belongs organises and puts those services in place, as, for example, the provision of a pitch or referee necessary for participation in every team sport. In such situations, it is, first, between the sports club and the service supplier and, second, between the sports club and its members that the services are supplied and the legal relationships formed.
>
> Thus, if the words 'services ... supplied ... to persons taking part in sport' in Article 13A(1)(m) of the Sixth Directive were interpreted as meaning that they require that the services in question be directly supplied to natural persons taking part in sport within an organisational structure put in place by a sports club, the exemption provided for by that provision would depend on the existence of a legal relationship between the service supplier and the persons taking part in sport within such a structure. Such an interpretation would mean that a large number of supplies of services essential to sport would be automatically and inevitably excluded from the benefit of that exemption, irrespective of the question whether those services were directly linked to persons taking part in sport and who was the true beneficiary of those services. Such a result would, as the Commission correctly maintains, run counter to the purpose of the exemption provided for by that provision which is to extend the benefit of that exemption to services supplied to individuals taking part in sport."

73. At [31] and [32] the court set out the interpretation that needed to be taken in order to ensure the effective application of the exemption under Article 13A(1)(m) of the Sixth Directive and also discussed the further conditions for eligibility under the first indent of Article 13A(2)(b) :

> "…that provision must be interpreted as meaning that services supplied in connection with, among others, sports practised in groups of persons or within organisational structures put in place by sports clubs are, generally, eligible to benefit from the exemption under that provision. It follows that, to determine whether supplies of services are exempt, the identity of the material recipients of those services and the legal form under which they benefit from them are irrelevant.
>
> However, to be eligible for that exemption, the services must, in accordance with Article 13A(1)(m) and the first indent of Article 13A(2)(b) of the Sixth Directive, be supplied by a non-profit-making organisation and they must be closely linked and essential to sport, since the true beneficiaries of those services are the persons taking part in sport. By contrast, supplies of services which do not meet those criteria, particularly those linked to sports clubs and to their operation

> such as, for example, advice about marketing and obtaining sponsors, cannot benefit from that exemption."

74. At [35] the ECJ noted the Directive provision was to be interpreted as meaning that:

> "in the context of persons taking part in sport, it includes services supplied to corporate persons and to unincorporated associations, provided that which it is for the national court to establish those services are closely linked and essential to sport, that they are supplied by non-profit-making organisations and that their true beneficiaries are persons taking part in sport".

75. Earlier at [34] the ECJ had noted the national court was to do this :

> "having regard to all the circumstances in which the transaction in question takes place in order to identify its characteristic features"

76. While I was not referred to it by the parties I must also note that there is authority at High Court level in the case of *The British Association for Shooting and Conservation Limited v CIR* [2009] EWHC 399 (Ch) on the interpretation of the Directive provision. That case concerned an appeal from the VAT Tribunal in relation to the residual subscription income of the appellant in that case and the question amongst others of whether certain services it supplied were "essential". At [36] Lewison J as he then was found that the VAT Tribunal (which had given its decision before the ECJ's decision in *Canterbury Hockey* had been given) had, in his judgment, required too restrictive a test by requiring that the supply had to have had a direct link with actual participation in sport. In that case the sport was shooting and the High Court indicated that in giving the examples the Tribunal had done of links that would qualify such as land upon which to shoot, provision of game to shoot at, or weapons with which to shoot, the Tribunal had set the bar too high.

77. After discussing various European law authorities (*EC Commission v France* (Case C-76/99) [2001] ECR I-249, *EC Commission v Germany* (Case C-287/00) [2002] STC 982 and *Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE v Ipourgos Ikonomikon* (Joined cases C-394/04 and C-395/04) [2006] STC 1349, and *Staatssecretaris van Financiën v Stichting Kinderopvang Enschede* (Case C-415/04) [2007] STC 294 Lewison J extracted the following propositions in relation to the test which appear to me to be binding on this tribunal:

> "i) The fact that a service is of great assistance to an exempted transaction is insufficient to make that service essential to that transaction;
>
> ii) The fact that there are alternative means of entering into an exempted transaction is relevant in determining whether the services in question are essential to that transaction;
>
> iii) But in considering that question the decision-maker must ask not merely whether, without the service in question, it would be impossible to enter into an exempted transaction, but whether it would be impossible to enter into an exempted transaction of the same value;

iv) In the case of sport the exempted transaction is the sport itself."

Parties' submissions

78. These are considered in more detail in the discussion sections below. The appellants do not take issue as such with the need to consider whether the "true beneficiaries" of the supply in question were persons participating in sport as set out in *Canterbury Hockey* and they agree the test is an objective test. Further they agree the predominant services from the bundle offered in respect of affiliation fees is the right of the individual to have a CONGU handicap and therefore to play in serious competitions. However, the appellants argue their facts are different and that the golfers are not true beneficiaries. Even if they were true beneficiaries then the appellants' position is that the supply in relation to CONGU handicaps is not essential for the sport. Further, even if CONGU handicaps were essential then the supply is exempt only in relation to those for whom it is requested and does not apply to those who do not benefit and have not paid for it.

79. Applying that test to the facts, HMRC say the evidence is clear that this is not a case where the unions / regional associations are supplying anything of benefit to the proprietor. Five out of the six witnesses said they were not getting marketing advice etc. from the unions/ associations. All witnesses said some members wanted a CONGU handicap and/or wanted to take part in competitions and that if the proprietor did not pay this then some members would leave. In determining what clubs pay fees for at least some of reason is for CONGU and competition participation.

80. The appellants highlight that on the evidence when affiliation was withdrawn by CAGU the club lost members and took 13 years to recover. Mr Roberts accepted that affiliation and the ability to play in competitions attracted the better players which in turn attracted other players; affiliation was therefore beneficial to the clubs. While some golfers benefitted by no means all did. Out of 700,000 golfers who were members of golf clubs, 400,000 did not have CONGU handicaps and out of two and a half million golfers in the country only 16% had CONGU handicaps.

Discussion

81. Before setting out my decision on the various issues raised I should make it clear what this decision does not set out to deal with. The appellants argue that it needs to be taken into consideration that provision of the discount card within affiliation fees must be considered to be a taxable supply. The point was not developed and I was not addressed by either party on the relevant case law on determination of single and multiple supplies. I therefore do not make any determination on this issue. The following analysis proceeds on the basis that there is a single supply made from the body to whom the subscription is paid.

82. The issues which were put before the tribunal in relation to whether the supply in relation to affiliation fees was standard rated or exempt were as follows: 1) Were golfers the true beneficiaries of the supply? 2) Even if they were true beneficiaries were CONGU handicaps essential to participating in sport? 3) Even if golfers were

true beneficiaries and the CONGU handicaps were essential could the supply be exempt in so far as it was the case that golfers did not regard the CONGU handicap as a benefit or had not for that reason or another paid the fees?

83. Although those issues were put to me in that order, I find it convenient, in order to deal with issues 1) and 2) to start with the issue 3). This is because in my view the issue which underlies issue 3) colours the first two issues in that it requires it to be established whether the true beneficiaries test is to be examined at the individual level of a particular participant or more broadly. Similarly, underlying the question of whether what is supplied is essential to participation in sport is the issue of whether the question is considered in relation to the particular individual participants or at a broader level.

84. HMRC argue that the services should be looked at objectively without assessing the intentions of each participant and that this is also clear from approach of the court in *Město Žamberk* (Case C-18/12) [2014] STC 1703. That case highlighted the legal certainty problems involved in looking to the intentions of visitors to an aquatic park and where the CJEU suggested looking at the layout of the park. The same issues of legal certainty would arise if each golfer's intentions had to be examined and it would, as Mr Hill for HMRC put it, be an "administrative nightmare". (Mr Brown pointed out this somewhat overstated matters given the CONGU handicap required an entry to be made on a computer it would be relatively straightforward to find out who benefitted from the CONGU handicap on an individual basis.) The appellants also refer to the fact that in *Canterbury Hockey* the charge of fees was calculated on the number of teams fielded whereas HMRC says this fact was not relevant as the CJEU made no reference to the method of calculation in providing its guidance.

85. In my view an approach which involves looking at the intentions of each individual golfer is misconceived. *Canterbury Hockey* does not pose the question of whether an individual is a true beneficiary from the point of view of each participant. This follows from the relevance and scope of the true beneficiary test which only arises in situations where the formal recipient of the supply is not a natural person. For present purposes there is taken to be a single supply made to non-natural persons (albeit a supply in relation to which the consideration is calculated according to the numbers of individuals who were members of the club at a particular point in time). The question as highlighted by the reasoning in *Canterbury Hockey* which needs to be addressed is who are the true beneficiaries of that supply? It is not relevant to ask in respect of a particular individual whether they are a true beneficiary. It is unsurprising therefore that as noted at [31] of the court's decision the identity of the material recipients of the services is stated to be irrelevant.

86. Further, neither *Canterbury Hockey* nor the distillation of the legal tests in *British Association of Shooting and Conservation* suggest an identification of each beneficiary or that the exercise involves looking at the particular way in which the sport practised by each beneficiary to see whether the supply is closely linked or essential; rather they suggest a test of whether the true beneficiaries of the supply are persons participating in sport in a more general sense and that the supply is essential to the sport the persons are participating in in a more general sense.

87. It follows from the above approach in *Canterbury Hockey* that the appellant's first line of argument (that the fees are not exempt because the fee charged by EG is charged to the clubs not to individual golfers and that as a charge to a corporate body the fee must be standard rated as form of corporate membership) must be rejected. The argument effectively relies on a literal interpretation of the Directive words which does not take account of how the law has been interpreted in *Canterbury Hockey* (to the effect that in order to take account of the effective application of the exemption, regard must be had not just to the formal legal recipient of the supply but to its material recipient or effective beneficiary). It is clearly the case in my view that the true beneficiaries of the supply in question are the golfers; the persons participating in sport. To the extent the appellants argue that it is the clubs who benefit because otherwise there would be disastrous commercial implications for the club then this not help their case; the fact the club may also benefit as a result of benefits to the sports participants does not detract from the true beneficiaries being persons who participate in sport.

88. The appellants also submit that it must be taken into account that it is the club that has to pay the fees and it is relevant that it pays the fees before it collects them (if it is able to collect them) from the individuals. However, there is nothing in the court's reasoning which suggests their analysis would be different if it were the case that the club paid the fee before it received any money from the member and it is notable that in *Canterbury Hockey* there is no discussion of the precise way in which the fees were paid from members to the club. The court (as set out at [35] of its decision) identified that the question for the national court was one of whether in the case of supplies to corporate persons the true beneficiaries of the supplies were persons taking part in sport.

89. The appellants' case is that *Canterbury Hockey* does not stand in their way as it can be distinguished on its facts. Whereas the point of hockey is to play competitively in leagues and competitions, golf is a social sport. They point to the fact that the affiliation fees in that case were calculated per team not per the individual.

90. There was some disagreement as to whether on the particular facts of *Canterbury Hockey* the appellants' argument was made out in that HMRC noted that there were more members than teams and therefore there would inevitably be members who would not get to play in inter-club competitions. Mr Brown, for the appellants, pointed out however that HMRC's calculations neglected to take account that the rules of hockey permit five substitutes so of the five teams fielded that accounted for 80 out of the 90 members. Further, HMRC point to the fact neither the FTT in *Canterbury Hockey* nor the ECJ considered whether individual players took part in interclub competitions and did not make comments on relevance of this point (for good reason in HMRC's submission referring to [23] as the issue had to be looked at objectively). In response the appellant says that because exemptions must be interpreted strictly, if only a limited number of players or participants benefit then the outcome should be that the fees fall outside of the exemption.

91. In my view, the tribunal can put to one side the disagreement as to how many members would be required to form a hockey team as I am not persuaded at the outset

by the basis upon which the appellant seeks to distinguish its facts from those of *Canterbury Hockey*. The ECJ did not actually make any determination on the issue of what England Hockey supplied as that was for the national court. (There was however it appears no reported decision of what the national court decided following the ECJ's decision.) The reasoning of the ECJ (that a supply may fall within the exemption even though the recipient is not a natural person) applies clearly in my view just as much to sports played for social reasons; it encompasses all sorts of sports and does not just encompass team sports. At [27] and [28] the CJEU referred to sport practised "within organisational and administrative structures put in place by…corporate persons, such as sports clubs" and went on to say that "sport within such a structure generally entails for practical, organisational or administrative reasons the individual does not himself organise the services which are essential to participation in the sport, but that the sports club to which he belongs organises and puts those services in place, as *for example*, the provision of a pitch or referee necessary for participation in every team sport" (emphasis added). The ECJ clearly referred to team sports by way of example. The rationale for extending the exemption to supplies other than the persons who formally receive the supplies clearly extends to sports which are not practised in teams and further is not restricted to sports where the participants only seek to participate in competitions. There is no reason therefore to suppose that in principle a supply could be essential to a sport that was played socially.

CONGU handicap not essential to playing golf?

92. The appellants' case is that the requirement that the supply is essential to the playing of golf is simply not met as regards the provision of CONGU handicaps. The CONGU handicap is not automatic; it is still the choice of individual whether to apply to get one or not. Members who refuse to pay are already playing golf; they do not need to be encouraged to do so and a formal handicap is as Mr Brown put it "the icing on the cake". The meaning of "essential" must be interpreted strictly, given the need to interpret exemptions strictly as a matter of principle. The casual golfer derives no benefit and even if certain individuals do benefit, the appellants argue it can only be those individuals who have actually paid the fee. It cannot apply to those who refuse to pay because they do not want the benefits.

93. HMRC disagree; the reasons clubs pay them is not for marketing or promotion but in order that a group of their members can get CONGU handicaps and participate in local and national union competitions. It can be seen from *Žamberk* that taking part in competitions is at the core or paradigm of a service which is closely linked with sport. If a golfer wants to enter competitions they need a CONGU handicap.

Discussion

94. As noted above it is not the case that the supply in respect of affiliation fees is to be regarded as being made to the golfers. It is a supply which is made to the club but nonetheless prima facie exempt under *Canterbury Hockey* (because the true beneficiaries are participants in sport). The further question for determination is whether the CONGU handicapping system is "essential" to sport or recreation. This is a question for the national court and it is clear from the example given at [28] of the

court's decision, which refers specifically to team sport and to the provision of pitches and referees, that regard may be had to the particular nature and kind of sport practised.

95. In *Žamberk*, which concerned the supply made by an eligible body aquatic park with multiple available activities the court decided that Article 132(1)(m) of the PVD must be interpreted as meaning that:

> "…non-organised and unsystematic sporting activities which are not aimed at participation in sports competitions may be categorised as taking part in sport within the meaning of that provision."

96. While *Žamberk* confirms that participating in competitions is the paradigm it also makes it clear that sport encompasses activities far broader than competition. The significant proportion of golfers who do not want or use a CONGU handicap in order to participate in competitions are no less participants in the sport of golf. At the other extreme, as indicated in *Canterbury Hockey* there are activities such as marketing, and obtaining sponsors which will not be essential to participation in sport. But, there is clearly a lot of space in between where the question of whether something is essential for participation in the sport requires closer examination. (The fact that there does not appear to be a marketing or sponsorship supply does not of course mean the supply is essential).

97. It is clear that for some golfers who want to participate in certain competitions where CONGU handicaps are a pre-requisite, that CONGU handicaps are regarded as essential to their sporting activity. But this is not the case for the majority of golfers. The fact is that on the evidence golfers clearly can and do play without the CONGU handicap. The rules of golf require a handicap in certain situations but not necessarily a CONGU handicap. From a marketing point of view it is also clear that golf course owners view it as a badge of prestige that members amongst them have the handicaps and can play in county competitions. Miss Saunders' evidence would be that it would be "commercial suicide" not to affiliate. The availability of CONGU handicaps is clearly of importance not just to those who use it (a minority) but also those who do not but seemingly appreciate certain of their fellow members playing at county competition level.

98. Both parties were agreed that in principle the matter must be approached objectively. What that means here is that despite a proportion of the members not regarding the facility to access the CONGU handicap as being essential to themselves that does not preclude the supply being one which is objectively essential to the sport. It is also necessary to take account of the approach to interpreting that term as elucidated by the High Court.

99. Taking the propositions Lewison J extracted in *British Association of Shooting and Conservation* in turn (at [77] (and substituting the term of participation in the sport for the term "entering into an exempted transaction" given point iv) in Lewison J's list), the facility of CONGU handicapping is in my view undoubtedly of great assistance to the sport of golf. It enables golfers to play competitively against each

other and to have a handicap as required by the rules. However being of great assistance is insufficient to make the service essential.

100. It is relevant to consider whether there are alternative means of participating in the sport. These are first that it is possible to play in non handicap social competitions and second that it is possible to play in handicap competitions (where the stipulations of the competition accommodate this) using a different type of handicapping system. The question though is not whether without CONGU handicapping it would be impossible to participate in the sport but whether it would be impossible to participate in the sport of golf of the same value. It is helpful in my view to note how the First-tier Tribunal in *The British Association for Shooting and Conservation* approached this aspect of the test when the matter was remitted back to it to deal with ([2010] UKFTT 268 (TC)). Judge Bishopp noted at [15] in the light of Lewison J's analysis that the test was not one of whether the association's supply made participating in the sport physically possible but "whether without its supplies, the quality of the sport would be of a materially lesser value". At [20] he put the question as being whether the supplies were of "significant value" to the sport. The facts of that case were rather different and concerned the association's campaigning, advisory educational and land management activities. Judge Bishopp concluded that without those activities sporting shooting within the UK in all its forms would be of a materially poorer quality and in some forms might not exist at all.

101. In my view without the system of CONGU handicapping it would be impossible to participate in golf of the same value, or putting it in the terms of the test as expressed by Judge Bishopp, without the facilitation of CONGU handicaps the quality of the sport of golf would be of a materially poorer quality. I reach this conclusion for the following reasons. First playing without handicap results, for those who would otherwise not have it, (i.e. not professionals) in a less competitive game. Secondly, while it is clearly possible to play the sport using other types of handicapping by agreement this will require an additional effort on the part of organisers in settling what system to use or devising their own. There will not be such a readily available pool of competitors or potential competitors; the CONGU handicapping system facilitates the organising of competitions with a greater breadth and diversity of competitors than would otherwise be the case. The CONGU handicap offers a standardised system across the nations of the UK. From the golfers' point of view it enables them to access a far greater number of competitions than would otherwise be the case. The essential nature of CONGU is borne out by the behaviour of golfers and the evidence that if the facility is not offered this would have adverse consequences in terms of attracting members. Players obviously care if their club allows members to get a CONGU handicap even if they do not themselves play competitively. In other words their behaviour demonstrates that the provision and facilitation of competition is important even if the form of golf they play is social. This is clear from the evidence and also by looking at what happened when the ability to play in competitions and get CONGU handicaps was withdrawn from Abbotsley. Further the very fact that withdrawal of CONGU handicaps is deployed as a sanction for non payment of the fee, and viewed as such indicates that it is of importance (otherwise it would simply be an empty threat).

102. The common system of handicapping and scratch rating is a means by which competition at higher levels can take place. The fact that some individuals have no interest themselves in using the facility does not stop the service being regarded as essential to sport. It may not be essential to the sport in the way they prefer to practise it but it is still essential to the sport when viewed in a broader sense and as that term is interpreted under the relevant case law.

103. The fact the calculation of the fee happens to be based on a headcount of number of members does not necessarily mean that the number of members who require CONGU handicaps is determinative. The facility of offering a CONGU handicap will become relevant as soon as there is one person who wants to play in a county competition and it is in that sense that the ability for the "true beneficiaries" to be able to access inter county competitions is essential to the sport.

104. The appellant's point that the test must be construed strictly does not assist. The High Court was well aware of the relevant principles of construction in relation to exemptions (see [12] of *British Association of Shooting and Conservation*) and there is nothing to suggest that the formulation of the various tests it put forward did not already take account of those principles.

Whether relevant whether particular golfer benefits?

105. As for the appellants' argument that even if golfers do benefit (because they refuse to pay or because they do not want the benefits because they have not received the benefits), it can only be by the golfers that have actually paid the fees, it follows from the conclusion reached above at [85]-[86] that this argument is not successful.

Issue 2: Can payments of fees be treated as disbursements?

106. The next issue put forward for the Tribunal's determination relates to whether the fees may be treated as disbursements. As will be apparent from what I say below this issue is not really an issue as both parties agree that under the relevant law the fees are not disbursements.

107. While, as explained by HMRC's skeleton argument, the term disbursement is not used in the Directive or in the UK's VAT legislation the concept derives from Article 79(c) PVD under which amounts which are invoiced by a taxable person as the agent of the customer are not included in the taxable amount, provided that the relevant amounts are received by the taxable person "as repayment of expenditure incurred in the name and on behalf of the customer".

108. Although Article 79(c) PVD has not been expressly implemented in the UK, it is submitted that by HMRC that the provisions of VATA 1994 which implement the PVD should be interpreted so as to comply with Article 79(c). These include section 19(2) VATA 1994, which defines the value of a supply for the purposes of VAT.

109. HMRC have published guidance (Notice 700) and also have operated an extra-statutory concession (ESC) since 2000, under which proprietary clubs have been

permitted to treat the recharge of affiliation fees as disbursements. This was initially set out in HMRC's press release of 20th October 2000.

110. The appellant's case is that the fees cannot be treated as disbursements under the law. Further they argue that the ESCs HMRC have given in this area are inapplicable and in any case should be withdrawn.

111. I can deal with this point relatively briefly because as is apparent from the decision letter which the appellant has appealed against the appellant and HMRC are in agreement that the fees are not disbursements under the letter of the law. HMRC agree the fees are not incurred by the clubs in the name of specific identifiable members and that the responsibility for payments rests with the clubs rather than the individual members. There is thus no disputed issue for the tribunal to resolve and in any case the agreed position is entirely consistent with the findings the tribunal has made on the evidence before it.

112. As was drawn to my attention by HMRC's submissions, the FTT has previously considered whether affiliation fees can be considered to be disbursements. In *Chipping Sodbury Golf Club* [2012] UKFTT 557 (TC) at [73] of its decision the Tribunal stated that:

> "In so far as they have been identified separately on invoices to members and those sums have been accounted for to the relevant association then it appears to us that they are in the nature of disbursements. As such they do not form part of any supply by the appellants to their members and are outside the scope of VAT."

113. But, the decision expressly acknowledged it was not clear how the affiliation fees had been treated on the facts of those cases and the tribunal's conclusions at [97] invited the parties to consider their position in relation to union fees and therefore did not make any determination on the point. There is also nothing to suggest the tribunal had evidence which this tribunal had before it as to who in particular bore the liability to pay the fees.

114. The appellants submit the tribunal is entitled to conclude whether the terms of the concession were complied with as the application of a concession is a prior decision on which the making of the assessment depends. This they say enables the tribunal to allow an appeal against a decision which depends on a prior decision under s84(10) VATA 1994 (*Shepherd v C&E Commissioners* [1994] VATTR 47 unreported).

115. Section 84(10) VATA 1994 provides:

> "Where an appeal is against an HMRC decision which depended on a prior decision taken in relation to the appellant, the fact the prior decision is not within section 83 shall not prevent the tribunal from allowing the appeal on the ground that it would have allowed an appeal against the prior decision."

116. However this submission does not explain why the Tribunal may make a determination on the applicability of the ESC. In this case there is no appeal against a decision which depends on a prior decision as to the applicability of the concession. (By contrast the facts of *Shepherd* concerned an appeal against an assessment based on standard rating of a supply which the appellant was arguing was zero rated under a ESC of the Commissioners of Customs and Excise; the question of liability turned on the extra statutory concession.)

117. It is not necessary in my view to explore the circumstances in which the tribunal might have jurisdiction to consider the applicability of an extra statutory concession because this is not a case where a taxpayer is being denied the benefits of the concession and seeking to fall within scope but one where the appellants seek confirmation that they are *not* able to fall within it. Given the applicability of concessions is something which by their very nature is not something which taxpayers are required to take advantage of I am not satisfied there is any proper basis for this tribunal to make a ruling the appellant seeks (i.e. that they do *not* fall within the concession).

118. Also to the extent the appellant's point is that the extra statutory concession is not in conformity to the legal position then that is something which follows from the inherent nature of extra-statutory concessions and is not a matter of dispute.

119. To the extent the appellant wishes to argue whether HMRC are entitled to issue the extra statutory concession or about the content of it then that is not something which is within this tribunal's jurisdiction but in principle would be a matter for judicial review.

Issue 3(a) – distortion of competition

120. As explained in the introduction to this decision, the reason why the appellants wish to establish that they cannot treat the payment of fees as a disbursement is to lay a foundation for an argument relating to distortion of competition as regards proprietary clubs and members' clubs.

121. The appellant's case in essence is that there is a distortion of competition between proprietary clubs and members' clubs because while members' clubs can meet the payment of affiliation fees from subscription income which is exempt, proprietary clubs have to meet the payment of fees from subscription income which is taxable. While proprietary clubs make a single standard rated supply of annual membership with the VAT on the affiliation fee element, members' clubs can make a single exempt supply of annual membership. They also highlight that if it is the case that the supply is to the clubs (as I have concluded it is) then while the onward supply to members is taxable in the case of proprietary clubs it is exempt when supplied by members' clubs.

122. HMRC note the difference arises from the treatment of membership fees being the predominant supply if there is a single supply. The CJEU's decision in *Bridport*

and West Dorset Golf Club (Case C-495/12) suggests that difference is built into the exemption.

123. In *Bridport* the CJEU dealt with a referral from the UT on an appeal relating to whether "green fees" (fees charged to visiting non-member) charged by the appellant members club and the ability of the member state to exclude such income from exemption under the provisions of Article 133(d) which referred to subject individual cases to a condition that the exemption "must not be likely to cause distortion of competition subject to VAT".

124. At [35] the CJEU held that the member state could not limit the scope of the exemptions in article 132(1)(m) in this way explaining that:

> "36. In this connection, it should be observed that the scope of the exemptions in Article 132(1)(b), (g), (h), (i), (l), (m) and (n) of Directive 2006/112 is defined not only by reference to the substance of the transactions covered, but also by reference to certain criteria that the suppliers must satisfy. In providing for exemptions from VAT defined by reference to such criteria, the common system of VAT implies the existence of divergent conditions of competition for different operators.
>
> 37 Accordingly, Article 133(d) of Directive 2006/112 cannot be construed in such a way as would enable the difference in the conditions of competition stemming from the very existence of the exemptions provided for under European Union law to be eliminated, since such a construction would call in question the scope of those exemptions."

125. The appellants take issue with any suggestion that *Bridport* held that green fees were exempt; rather they say that what the CJEU decided is that the exemption could not be limited to membership fees.

126. However the question of whether the decision establishes that green fees are exempt is not in point. The clear rationale which is emerges from the CJEU's decision as to why distortion of competition was not a valid reason for the UK to exclude members' club green fees from exemption was because this would undermine the scope of the exemption which provided for and envisaged a different treatment for profit making bodies and non profit-making bodies. The appellants' difficulty is that there is no basis put forward relating to distortion that is independent from the conclusion drawn in *Bridport* that the difference in treatment (which the court acknowledged) is inherent in the exemption.

127. Thus, applying the insight of the court in *Bridport* in relation to the appellant's argument that there is distortion because they as proprietary clubs must meet the cost of the affiliation fees out of standard rated subscription income whereas members' clubs can meet it out of exempt subscription income the difference in treatment arises out of the different status under the Directive of members clubs and proprietary clubs as respectively non profit making and profit making bodies which is a difference in treatment which is built into and therefore intended by the Directive.

128. The same logic applies in relation to the argument that their onward supply to a member is taxable whereas that of a members' club would not be. While there is a difference in treatment it arises because the "common system of VAT implies the existence of divergent conditions of competition for different operators".

129. I do not therefore need to deal with HMRC's secondary point which is that there is in any event nothing to stop proprietary clubs if they wish from treating affiliation fees as disbursements in relation to customers who have not died or left or refused to pay (I ought however to note my reservations on any argument that, if there was a distortion of competition issue, that HMRC could rely on the treatment of disbursements afforded under an ESC rather than the law to meet the point).

130. While I note Miss Saunders' evidence in her witness statement refers to her own personal circumstances as a member of a member's club and her paying lower fees because the affiliation fees are absorbed within an exempt supply rather than such supply being standard rated when paid to a proprietary club, this does not allow a distortion argument to be litigated. First, Miss Saunders is not an appellant, and second, as HMRC point out, any distortion comes about because of the integration with the membership fee in relation to which the exemption specifically provides for a distinction to be drawn between profit making and non-profit making bodies as confirmed in *Bridport*.

Issues 3(b) and (c): Legality of 1999 Sports Order and Reference to the CJEU

131. As flagged at the outset of this decision, the above arguments are, from the appellants' perspective simply the warm up act to the hoped for main attraction; a reference by this tribunal to the CJEU of the question of whether the 1999 Sports Order is valid under European Law. The context to this is that prior to the introduction of the Order it was, it is argued, possible for proprietary clubs to enter into arrangements whereby the members' club mandated to be formed by EGU paid a license fee to the proprietary club which it is argued enabled proprietary clubs to treat membership subscription income as exempt. Following the Order the arrangements could no longer have that effect.

132. The appellants argue that the 1999 Sports Order goes further than permitted by the Directive by excluding any non-profit making organisation which a) receives from an associated person a grant of any interest in or right over sports land or the grant of any licence to occupy sports land unless for no consideration or "nominal" consideration or b) receives from an associated person any services consisting in the management of any facilities provided by that body.

133. The parties were alerted at the start of the hearing to my concerns as to the fact that none of the appellants had in place a set of arrangements which brought into play the applicability or otherwise of the 1999 Sports order and the tribunal was therefore being asked to determine a hypothetical issue. HMRC agreed, maintaining that effectively the appellants were seeking to argue that the 1999 Sports Order was ultra vires because it stopped them implementing arrangements whereby the membership fees may be exempt even though there was no factual issue which put that question

before the court. They also highlighted that this concern was relevant to the issue of whether it would be proper to make a reference to the CJEU.

134. The appellants were invited by me to assuage my concerns. Their submissions made the point, first that several witnesses had addressed the arrangements in their evidence and second that the Tribunal had heard evidence from Miss Saunders and other witnesses as to arrangements that were in place which were prevented by the 1999 sports order when it was enacted. If the 1999 Sports Order had not been enacted then Abbotsley would have continued with the arrangement that it operated before and they say that is enough of a factual context for the matter to be referred.

135. Neither point unfortunately persuades me that the Tribunal can deal with the matter. None of the other witnesses who had in their evidence referred to the licensing arrangements were appellants in this matter. In any case, the fact that an appellant (and this would apply equally in relation to Miss Saunders' evidence) may in the past have had such arrangements would not make the concern that the tribunal was being asked to determine a hypothetical issue a valid one in that the circumstances of those supplies are not before the tribunal for a determination of the VAT which was chargeable in relation them. The issue would still come down to what the correct tax position would be made *if* a taxpayer made arrangements rather than on a taxpayer who did have such arrangements. This tribunal is in any event ill equipped on the evidence that has been brought before it to make the necessary findings as to what the arrangements were, whether they achieved their intended tax effect before the 1999 Sports Order and whether they lost those as a result of falling within scope of the 1999 Sports Order such that the legality of the Order becomes a relevant issue on such facts.

136. While I well appreciate the strength and sincerity of the opinion that Miss Saunders and other proprietors hold to the effect that the 1999 Sports Order has destroyed their businesses I cannot ignore the fact that this Tribunal cannot on the basis of the facts of the appellants before it make a determination on the legality of that Order in the abstract. This is not a new issue; a similar concern was raised by the tribunal in the *Chipping Sodbury* case. Mr Brown referred me to the decision letters of HMRC which made determinations on the matter which it is said acted as the catalyst for appellant proceeding before the tribunal in the way it had. It is regrettable if those gave the impression that the question of the legality of the Order was one upon which the tribunal could make a ruling on in the absence of relevant facts but even if that was the case it would not accord to the tribunal the jurisdiction to decide a matter which it would not otherwise have.

Should a reference be made?

137. The appellants make an application, which HMRC oppose, for a reference to the CJEU on the question of the legality of the 1999 Sports Order.

138. Article 267 of the Consolidated Treaty on the Functioning of the European Union provides so far as relevant:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon..."

139. I was referred to the judgment of Proudman J in the *Bridport* case in the Upper Tribunal (*HMRC v Bridport Golf Club* [2012] UKUT 272 (TCC) which had made the reference to the CJEU discussed above and which discussed and considered the relevant authorities on the circumstances in which a referral ought to be made. In particular Lord Denning's statement set out in *HP Bulmer v J Bollinger SA* [1974] 2 All ER 1226 that there should only be a reference if it is necessary in order to give judgment and that even then there was a limited discretion as to whether to refer and in that respect mentioned various factors to be taken into account such as the time to get a ruling, the expense of the reference, the importance of not overwhelming the court, the need to formulate the question clearly, the difficulty and importance of the point at issue and the views of the parties. The UT's decision in *Bridport* also set out the passage from Sir Thomas Bingham's judgment in *R v Stock Exchange ex parte Else Limited* [1993] QB 534 highlighting the advantages of the European Court in construing European legislation and stating that in relation to a national court (other than a final court of appeal):

> "…If the facts have been found and the Community law issue is critical to the court's final decision the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself."

140. The parties agree on the factors which are relevant to the question of whether to make a reference but not on how they are to be applied in this case. The appellants say there is reasonable doubt on the law and that it is an important issue for those involved in golf in the UK; the proprietary golf industry is being decimated by the continuation of the 1999 Sports Order and a reference is required urgently. They argue that that fact alone weighs in favour of making the reference. They highlight that at [38] of the UT's decision in *Bridport* the fact there were a very great number of cases which turned on or were affected by the issue featured heavily in the UT's evaluation of the discretionary factors suggesting that a referral should be made. As well as highlighting concerns about the hypothetical nature of the issue sought to be referred in so far as the current proceedings are concerned, HMRC submit that the discretionary factors point against a reference: the legal position is clear, the relevant facts (pertaining to the arrangements which are impacted by the 1999 Sports Order) are not found and there is no evidence that there are inconsistent approaches across the EU.

141. It is not however necessary for the tribunal to consider and weigh up such discretionary factors in my view. My conclusion above is that the question of the

legality of the 1999 Sports Order is a hypothetical matter which it is not within the tribunal's jurisdiction to determine in the context of the current appeals before it.

142. It follows inevitably from that conclusion that the issue is not one which I consider is necessary to be determined in order to give a judgment in these proceedings. The application for a reference to the CJEU is therefore refused.

143. While HMRC made submissions on why they say the 1999 Sports Order was not ultra vires the Directive it is not necessary, in view of my conclusion above, to set those arguments out or to give any views on their merits.

144. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SWAMI RAGHAVAN

TRIBUNAL JUDGE
RELEASE DATE: 11 DECEMBER 2015